

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF TENNESSEE  
3                   AT KNOXVILLE, TENNESSEE

4                   \_\_\_\_\_  
5                   SNMP RESEARCH, INC. and SNMP  
6                   RESEARCH INTERNATIONAL, INC.,

7                   Plaintiffs,

8                   vs.

9                   EXTREME NETWORKS, INC.,

10                  Defendant.  
11                  \_\_\_\_\_  
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Case No. 3:20-CV-451

26                   **TELEPHONE DISCOVERY CONFERENCE**  
27                   **BEFORE THE HONORABLE DEBRA C. POPLIN**

28                   **May 3, 2023**  
29                   **10:05 a.m.**

30                   APPEARANCES:

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1 (Proceedings commenced at 10:05 a.m.)

2 THE COURTROOM DEPUTY: We are here for a discovery  
3 conference in Case 3:20-CV-451, SNMP Research versus Extreme.  
4 Here on behalf of the plaintiffs are Olivia Weber and Cheryl  
5 Rice. Are the plaintiffs ready to proceed?

6 MS. WEBER: We are, Your Honor.

7 MS. RICE: We are.

8 THE COURTROOM DEPUTY: And here on behalf of the  
9 defendants are John Neukom, Leslie Dimmers, Chad Hatmaker, and  
10 Barbara Barath. Are the defendants ready to proceed?

11 MS. BARATH: Yes, Your Honor.

12 THE COURT: All right. Good morning. This is Judge  
13 Poplin. Could I ask the parties who will be making their  
14 presentations on the client's behalf? First for plaintiff?

15 MS. WEBER: Yes. Olivia Weber will be primarily  
16 handling the argument today.

17 THE COURT: And for defendants?

18 MS. BARATH: That would be me, Your Honor, Barbara  
19 Barath.

20 THE COURT: All right. Thank you. Okay. So I've had  
21 an opportunity to review your position statements, and there is  
22 (inaudible) to the issue, and I've been able to have time to  
23 consider those, so I do not need you to reiterate with  
24 (inaudible) what is in your position statement. So I would like  
25 to ask you to limit your presentations in this conference to

1 approximately 5 minutes. So I'll recognize you, Ms. Weber.

2 MS. WEBER: Thank you, Your Honor. Again, this is  
3 Olivia Weber on behalf of plaintiffs. May it please the Court,  
4 we are as you know respectfully requesting a ruling that each  
5 plaintiff constitute one party for purposes of Rule 33's  
6 numerical limit and that as such each plaintiff may serve 25  
7 interrogatories on Extreme. Extreme has refused to answer SNMP  
8 International's Interrogatory 6 on the grounds that the  
9 plaintiffs should be treated as one party for purposes of Rule  
10 33 and that the parties have at this point exceeded the 25  
11 interrogatory numerical limit when you count together their  
12 separately served sets of interrogatories and tally them up.

13 As Your Honor has requested, I'm not going to repeat  
14 argument in plaintiff's submission. I will instead emphasize a  
15 few overarching points and then respond to a few of Extreme's  
16 arguments in its position statement.

17 First, the plain language of Rule 33(a)(1) sets a  
18 numerical limit per party and not per side. The Supreme Court  
19 in approving the federal rules differentiated between limits per  
20 side and per party. For example, Rule 30 sets a deposition  
21 limit per side, but Rule 33 sets the numerical limit per party,  
22 and it is plaintiff's position that the federal rules should be  
23 taken at face value, particularly where there are plain  
24 differences in the language used.

25 Second, plaintiffs have served separate sets of

1 discovery from the very beginning of this case in December of  
2 2020 and up until about two months ago when Extreme responded to  
3 SNMP International's Interrogatory Number 6. Plaintiffs have no  
4 notice that Extreme was counting the interrogatory limit by  
5 combining the separately propounded sets of interrogatories.

6 I'd like to also briefly respond to a couple of points  
7 that Extreme made in its position statement, and then I would be  
8 happy to answer any questions that the Court may have or address  
9 plaintiffs in the alternative requests for 25 additional  
10 interrogatories.

11 Extreme claims that plaintiffs have somehow recognized  
12 that they should be treated as single entities throughout this  
13 case including by responding to Extreme's interrogatories  
14 together. That's incorrect, and I wanted to flag for Your Honor  
15 that plaintiffs responded together to Extreme's interrogatories  
16 because Extreme propounded its interrogatory request on both  
17 plaintiffs together. In fact, it propounded all of its  
18 discovery that way, and furthermore, Extreme's interrogatories  
19 repeatedly use the terms "SNMP" and "your" which were defined to  
20 include both plaintiffs.

21 Another one of Extreme's arguments in its position  
22 statement is that some of plaintiff's separately served  
23 discovery requests have overlapped, but Rule 33 speaks in terms  
24 of parties plain and simple without regard to overlap.  
25 Particularly, that's the case where plaintiff's claims as here

1 arise from the same or related course of conduct, and  
2 plaintiff's position is that Rule 33's plain language should be  
3 enforced.

4           They also note that sometimes SNMP International's  
5 rogs will refer to rogs served by SNMP Research including SNMP  
6 Research Rog. 1, and I just wanted to take a moment to explain  
7 that that is because SNMP Research's Interrogatory 1 is  
8 essentially a seminal rog. It's an identification of all  
9 Extreme products containing SNMP Research software, and so  
10 referring to Extreme's response to SNMP Research Rog. 1 is  
11 simply a shorthand for referring to the thousands of accused  
12 products that Extreme has identified in this case.

13           Lastly, Extreme relies upon Your Honor's decision in  
14 *Knox Trailers*. That decision in plaintiff's view did not  
15 address whether related entities should be counted as one party  
16 due to their close relationship. Despite the plain language of  
17 Rule 33, our reading, Your Honor, observed the split of  
18 authority in district courts but reasoned that because the  
19 plaintiffs served their first 24 discovery requests together as  
20 a unified entity, the Court would not require the defendant to  
21 respond to additional interrogatories above that. And as we  
22 noted in the position statement, here plaintiffs did not serve  
23 their interrogatories together. By contrast, we have propounded  
24 our interrogatories separately since December of 2020.

25           I'd be happy to answer any questions at this point or

1 to discuss our alternative request for relief, but otherwise I'm  
2 ready to hand it over.

3 THE COURT: I do have one question in terms of the  
4 privilege log that was noted in Extreme's position statement was  
5 that the plaintiff responded to that as one, but here you  
6 explained that the response to their discovery was that was  
7 given in that way because of the way it was propounded. I just  
8 want to clarify whether that was the same issue with respect to  
9 how the privilege log was assembled.

10 MS. WEBER: Yes. That's correct, Your Honor. The,  
11 the discovery request, both interrogatories and RFPs did not --  
12 they were served together, propounded together upon both  
13 plaintiffs, and both plaintiffs together served a privilege log  
14 in return.

15 THE COURT: Okay. Thank you, Mrs. Weber.

16 MS. WEBER: You're welcome.

17 THE COURT: All right. At this point I would like to  
18 turn to Ms. Barath for Extreme's presentation, and then if  
19 necessary, we'll go back to the issue of going beyond the 25.  
20 So Ms. Barath?

21 MS. BARATH: Thank you, Your Honor. Based on the  
22 presentation we've heard, it seems clear that plaintiffs  
23 actually are not entitled to more than 25 rogs, and they have  
24 not even attempted to make the particularized showing that's  
25 necessary to exceed that number.

1           So on the first point, are they entitled to more than  
2 25. The Court in *Knox*, this Court, recognized that the typical  
3 rule when you're dealing with closely-related parties is to  
4 treat them as one party, and here there's no dispute that the  
5 parties are closely related. While the parties may have  
6 different names, they are both managed by the same person based  
7 on the same farm where that person lives, share the same  
8 counsel, and they've acted in a coordinator manner in this  
9 litigation from the very beginning.

10           So if you look back at the Rule 26(f) statement that  
11 the parties submitted, they actually argue that the plaintiffs  
12 collectively should serve a certain number of rogs. Granted  
13 they asked for more at that point, but the Court never ruled in  
14 that. My point there is just that they were, then collectively  
15 the plaintiffs should get a certain number.

16           As we mentioned in our papers, they collectively  
17 responded not just to discovery but to motions to basically  
18 everything that's happened in this court, and even now they're  
19 arguing on behalf of both plaintiffs, and I believe counsel  
20 mentioned that the reason they responded to discovery  
21 collectively was that Extreme propounded requests to them  
22 collectively. While that's true, I think that just reiterates  
23 the facts that they were on notice of the fact that Extreme  
24 considered them to be one entity and treated them as one entity,  
25 and beyond the fact that they were responding together, they



1 actually talked about themselves collectively.

2           So we mentioned this in our papers, but the damages  
3 interrogatory, we asked them, you know, what damages plaintiffs  
4 contend that they're entitled to, and they responded  
5 collectively that plaintiffs together intend to seek  
6 such-and-such type of damages based on plaintiff's software. So  
7 it wasn't, you know, both of them responded to these rogs. They  
8 were taking a unified position.

9           And with respect to the privilege log, it's not just  
10 that they served, you know, one privilege log where each entity  
11 had, you know, a separate line for their separate documents.  
12 They made no differentiation between the parties on that log as  
13 is if they were one party.

14           And in the rogs they served on us, while it's true  
15 that they said, okay, this set is from one entity and this other  
16 set is from another entity, if you look at the actual substance  
17 of the rogs, they didn't actually differentiate between the  
18 entities at all.

19           So first of all, they define SNMP Research to mean  
20 both entities, and then if you look at the rogs themselves, they  
21 use that definition. Same thing for SNMP software. They're  
22 basically saying the software is created by these two entities.  
23 Respond to us about this software collectively.

24           So it's not just -- it wasn't clear to us, let me put  
25 it that way, that even though SNMP-I, for example, was serving a

1 set of rogs that those were specific to SNMP-I in some  
2 particular way. In fact, plaintiffs haven't pointed to any rogs  
3 that pertain to one party versus another given the subject  
4 matter of the rogs.

5 So as far as the case law, plaintiffs have attempted  
6 to differentiate this Court's holding in *Knox* by arguing that  
7 there the interrogatories were served, were propounded  
8 collectively, but as I just said, I think that's basically true  
9 in this case as well. While the caption may be slightly  
10 different, the actual substance of the rogs was collectively on  
11 behalf of the plaintiffs, and there was no differentiation  
12 between them.

13 And besides that, as this Court noted, the rule was  
14 that when parties are just nominally separate, they should be  
15 treated as one side. Notwithstanding the language in Rule 33,  
16 the word "party" basically means to be construed to cover both  
17 entities when there's really no difference between the entities.

18 The cases that plaintiff cited actually confirm this  
19 position. They cited this case *Adlerstein*. That case  
20 recognized the rule and found that several defendants that  
21 cooperated and worked closely together should be considered one  
22 party under the rule, but the same thing is true here, and  
23 plaintiffs haven't cited to a single case that I'm aware of  
24 where related parties were not treated as a single party for  
25 purposes of the Rule 25 limit. So that's entitlement.

1           What -- how many rogs should by default plaintiffs get  
2 here, the answer is 25 because they're acting collectively as  
3 one party, not just differentiating between themselves from the  
4 very beginning of this case.

5           And then I guess I did also want to make the point  
6 that to the extent that they're seeking more rogs, they haven't  
7 even attempted to make a particularized showing. They've made  
8 some general statements about the complexity of this case, but  
9 that's, this Court recognized both in the *Knox Trailers* case and  
10 in the *Glasswall* case, *Glasswall* that we cited in our papers,  
11 that you can't just say there are a lot of claims at play, that  
12 there are a lot of documents at play. You actually need to  
13 point to specific discovery that you need, and in most cases,  
14 parties will actually serve the rogs that they're intending the  
15 Court to give them leave to serve so that the Court can actually  
16 review them and decide, okay. You cannot get this discovery in  
17 a better way, then that's why you need additional rogs.

18           Here we're talking about one rog that they have served  
19 that we've looked at, and for that one the parties are actually  
20 already negotiating a stipulation to obviate the need for that  
21 rog, so hopefully that one will be resolved; but on top of that,  
22 they're actually asking for 24 additional rogs that they haven't  
23 even told us what the subject matter is let alone identified  
24 individual rogs that they intend to serve.

25           So they have a ton of discovery already in this case.

1 We're talking nearly a million pages of documents. They've  
2 served well over 150 discovery requests. They're getting all of  
3 our source code. Their existing rogs cover all of their accused  
4 products. They've already started asking discovery about issues  
5 that are related to their new claims, and so we're just not  
6 understanding what they even need, but they can't get the  
7 additional RFPs, the RFAs which aren't limited or depositions  
8 for that matter.

9 So given that they haven't even attempted to make a  
10 particularized showing for additional rogs, we would ask that  
11 you deny their motion.

12 THE COURT: Okay. Thank you, Ms. Barath. All right.  
13 Ms. Weber, back to you. I'll give you an opportunity to respond  
14 as you wish for a few minutes, but I do have one particular  
15 question. Ms. Barath has noted that while the discovery was  
16 propounded separately, in looking to the form of the substance  
17 of the request in the interrogatory was the same, so that is one  
18 particular question I would like for you to address.

19 MS. WEBER: Thank you, Your Honor. I would be happy  
20 to address. I'll start by addressing that, and then I will  
21 address a few points from Ms. Barath's argument.

22 First of all, as Your Honor noted in *Knox Trailer*,  
23 form is important, and plaintiffs painstakingly adhered to  
24 separate forms by separately propounding the interrogatories.

25 As to the substance, I'd be happy to submit as an

1 example the request that each plaintiff served on Extreme, but  
2 if you -- I can take -- I'm just opening this now, and I can  
3 take a couple of examples 'cause I'm not, I'm not exactly sure  
4 how Ms. Barath is making this contention.

5 For example, Interrogatory Number 1 from SNMP Research  
6 asks for as I mentioned identification of all Extreme products  
7 that contain, use, or otherwise associated with SNMP Research  
8 software, either as manufactured or as a result of a software or  
9 firmware installation or update. So that's framed at the  
10 accused products, and Interrogatory Number 2 asks for any  
11 Extreme partners who are selling these products.

12 Interrogatory Number 3 is similarly product related.  
13 It asks for the version number of plaintiff's software in those,  
14 in the accused products identified in Rog. 1, and so on and so  
15 forth. All of these interrogatories are framed with respect to  
16 the accused products and Extreme's conduct in relation thereto.

17 And it is correct that -- so SNMP Research owns the  
18 copyright registration for these copyrighted works, and as  
19 co-plaintiff, SNMP International is the licensor of these  
20 copyrighted works. So there's certainly some overlap or at  
21 least some of the responses to SNMP Research, Research's  
22 interrogatories are certainly relevant to SNMP International's  
23 claims, but that doesn't change the fact that we have served  
24 separate sets of discovery requests. We've been careful to do  
25 so, and I certainly disagree with the broad brush stroke that

1 just because the subject matter of the discovery responses is  
2 relevant to both of the plaintiff's claims that now somehow  
3 plaintiff has, have waived the right to serve 25 rogs each as  
4 they're entitled to under Rule 33.

5 Does Your Honor have any further questions on this in  
6 particular? Because if not, I will move on.

7 THE COURT: No. Thank you. You can proceed with your  
8 brief comments.

9 MS. WEBER: Okay. Thank you. I'll keep it brief.

10 Ms. Barath began by noting that Your Honor's decision in *Knox*  
11 *Trailers* recognized that the typical rule is that when the  
12 parties are closely related, you treat them as one party for  
13 purposes of Rule 33. I don't think I should try to tell Your  
14 Honor what Your Honor ruled, and I, I'll just keep it short by  
15 saying that if you go and look at the decision in *Knox Trailer*,  
16 it does not make that holding or observation anywhere. As we  
17 noted in the brief, *Knox Trailer* observed a split of authority,  
18 but it does not make that, that fine tooth comb holding there's  
19 a typical rule that somehow the parties are closely related, the  
20 Court will not follow the plain language of Rule 33.

21 Secondly, Ms. Barath noted that plaintiffs made an  
22 offer in the Rule 26(f) report that they should get 75 rogs  
23 collectively per defendant. Plaintiffs -- I think that's  
24 consistent with the fact that plaintiffs gave notice to Extreme  
25 from the very outset of the case that they were going to seek to

1 increase the numerical limit of a lot of interrogatories, and  
2 their request to serve the 50, more than the 50 interrogatories  
3 to which plaintiffs were already entitled was in no way a waiver  
4 of plaintiff's right to each serve 25 interrogatories on each  
5 defendant. And that's demonstrated by the fact that just a few  
6 days, I think two days after plaintiffs met for purposes of Rule  
7 26(f), plaintiffs then served their separate sets of discovery  
8 on plaintiffs or on Extreme on December 26.

9           With respect to negotiating a stipulation on SNMP  
10 International Rog. 6 and the assertion that that will obviate  
11 the need for that rog, this is the first time we've heard that  
12 Extreme will agree to provide that information absent an  
13 interrogatory request on that topic, and if that is correct, if  
14 I'm understanding them correctly, that is good news.

15           I will briefly also respond to the assertion that we  
16 have not made a particularized showing of the need for  
17 additional interrogatories, and I will keep this very brief  
18 because I think our papers explain why 25 interrogatories would  
19 be adequate if Your Honor does not agree with plaintiff's  
20 interpretation of Rule 33's numerical limit.

21           The -- I can go through a couple, at least a couple of  
22 topics for which plaintiffs would like to serve interrogatories.  
23 That includes Extreme's, the factual basis for Extreme's  
24 affirmative defenses, the course of alleged fraudulent conduct  
25 and Extreme's breaches, and I can get more specific in that

1 regard. We are hoping to serve interrogatories regarding the  
2 number of misrepresentations that Extreme has made dating back  
3 to at least 2015. These underlie the claim for fraud, and that  
4 would, those interrogatories would go to what Extreme was  
5 selling, how much it was selling and when, and its position on  
6 those things. In a recent motion, Extreme has also hinted that  
7 plaintiff's software is somehow not copyrightable, so we'd  
8 inquire additional interrogatories as to Extreme's position on  
9 that.

10 In recent motions filed just last month, Extreme is  
11 also apparently asserting a statute of limitations and discovery  
12 rule defense, and so we would need to pin them down on their  
13 position in that regard. We would also use interrogatories to  
14 pin Extreme down on their positions regarding breach and which  
15 products were in their view sold under which contract.

16 Extreme's positions on their authority to sell certain  
17 products have shifted throughout this litigation. First it was,  
18 they claim that they had authority to sell accused products  
19 under a license called Enterasys, and then later they changed  
20 their position to having authority to sell those products under  
21 a separate license, the 2001 license with Extreme. And so we  
22 would like to pin Extreme down on exactly what it is contending  
23 it had authority to sell and when down to the very target  
24 processor, the operating system, and the development tools and  
25 the basis for that belief.



1           As just another example, Extreme has contended that  
2 plaintiff's software is published, and that's, their  
3 registrations are somehow invalid. We would like to clarify and  
4 pinpoint the basis for Extreme's assertion in that regard, and  
5 an additional 25 interrogatories is an approximation of what we  
6 believe we need, and it is our attempt at a compromised position  
7 with Extreme.

8           As Extreme noted, we requested 75 interrogatories per  
9 defendant initially. This is our comprised position. It's very  
10 difficult at this stage with little more than a year left of  
11 discovery and additional claims for fraud and breach and  
12 expanded scope of infringement to prognosticate exactly how many  
13 we will need, and 25 additional is a fair and reasonable amount  
14 and comprised position in our view, especially in a complex case  
15 such as this because the interrogatories will help simplify and  
16 clarify what's actually in dispute and focus the remainder of  
17 the discovery period.

18           And that's all I have unless Your Honor has additional  
19 questions for me.

20           THE COURT: All right. No. Thank you, Ms. Weber.  
21 All right. I need sort of a few moments to consider the  
22 presentation, so I'll be right back with you, but I'm, but I am  
23 going to put you on hold for just a few moments.

24           MS. WEBER: Okay. Thank you.

25           (Recess taken.)

1           THE COURT: All right. Thank you for holding for just  
2 a moment. The Court has considered the parties' position  
3 statements and the additional presentation during this morning's  
4 conference, so I'm prepared to go ahead and rule on this matter.

5           Rule 33(a) (1) by its terms does not limit multiple  
6 plaintiffs or multiple defendants in a case to a combined total  
7 of only 25 interrogatories. As discussed, the rule provides  
8 that a party may serve on the other party no more than 25  
9 written interrogatories including theirs to the parties.

10           In light of the rule's specific reference to "parties"  
11 as opposed to "sides," the Court is going to enforce the 25  
12 interrogatory limit per party unless there's reason to depart  
13 from this general rule including any of the reasons enumerated  
14 in Rule 26(b) (2) (C). Both parties here have acknowledged case  
15 law departing from the reading of this rule including my  
16 decision in *Knox Trailers*.

17           Here Extreme argues that there is reason to depart  
18 from the rule because the plaintiffs are only nominally  
19 separate. Several cases have explained that parties may be  
20 considered nominally separate when represented by similar  
21 attorneys, when there is a unity of action, or when there is a  
22 legal relationship between the parties. Extreme argues that  
23 that is the case here.

24           While plaintiffs are certainly related entities, the  
25 Court will decline to treat them as the same for purposes of

1 Rule 33. The Court recognizes that while they have been  
2 coordinated in presenting motions throughout the litigation,  
3 plaintiffs have separately served interrogatories on the  
4 defendant making this a different situation than what's  
5 presented to the Court in the *Knox Trailers* case.

6 Extreme references the Rule 26(f) report in support of  
7 its position, but the Court does not find this is persuasive  
8 given that the plaintiffs specifically noted the complexity of  
9 the issues and the proposal to serve 75 interrogatories  
10 collectively as to each defendant.

11 I've also reviewed the amended complaint, and it  
12 states that SNMP Research is primarily the research and  
13 development company that creates the license and supports the  
14 products, but SNMP International is primarily responsible for  
15 sales and marketing.

16 While the same person runs those companies, plaintiffs  
17 have set forth different causes of action in the amended  
18 complaint against Extreme. SNMP Research, for example, they're  
19 just the registered owner of the copyright and therefore alleges  
20 copyright infringement while SNMP International is alleging  
21 breach of contract in this cause of action.

22 So in light of the different companies, the fact that  
23 they've not acted as a single entity during discovery and the  
24 different causes of action alleged in the amended complaint, the  
25 Court will not treat them as a single entity for the purposes of

1 Rule 33.

2 So the Court has also considered the proportionality  
3 of such discovery and finds that to be reasonable under the  
4 circumstances presently before the Court, so I'll be putting  
5 down a brief order reflecting that that I just reviewed.

6 Is there any further matters to be taken up at this  
7 time? Ms. Weber, on behalf of plaintiffs?

8 MS. WEBER: Thank you, Your Honor. There are no  
9 further issues to be taken up at this time. We are negotiating  
10 a few remaining issues as to hopefully a negotiated field  
11 environment stipulation. Your Honor ordered Extreme to produce  
12 the build environment last year, and we're trying, we're working  
13 to try to obviate the need for Extreme to have to do that, and  
14 we think we're really close to reaching a stipulation on that.  
15 We're also negotiating hopefully some, getting some information  
16 on Extreme's forthcoming source code production so that we can  
17 handle that without need for court intervention, but at this  
18 time there's nothing else we need to slide for Your Honor, and  
19 thank you for your attention to this matter today.

20 THE COURT: All right. Ms. Barath, anything further  
21 on behalf of Extreme?

22 MS. BARATH: No, nothing further. Thank you, Your  
23 Honor.

24 THE COURT: All right. I hope you all have a good  
25 day. Thank you.

(Proceedings concluded at 10:41 a.m.)

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C E R T I F I C A T E

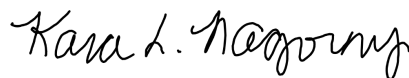
STATE OF TENNESSEE )

COUNTY OF KNOX )

I, Kara L. Nagorny, RPR, RMR, CRR, do hereby certify that I reported in stenographic machine shorthand the above proceedings; that the foregoing pages were transcribed under my personal supervision and with computer-aided transcription software and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel of any of the parties nor an employee or relative of any attorney or counsel connected with the action nor financially interested in the action.

Transcript completed and dated this  
15th day of May, 2023



Kara L. Nagorny, RPR, RMR, CRR  
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